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Supreme Court, U.S.
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NO. 88-1129

In the Supreme Court of the United States

October 1988 Term

ALWAN BROTHERS COMPANY, an Illinois Corporation, JOSEPH ALWAN and WILLIAM ALWAN, Individually and d/b/a ALWAN BROTHERS PARTNERSHIP

Petitioners,

vs.

JANE GNIDOVEC, DAVID TOWELL and ROBERT DAWSON

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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QUESTION PRESENTED

Does the procedure allowing a jury discretion to award punitive damages in civil cases without guidelines or standards by which to account for such award lack due process?

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[1] All parties to this action are listed in the style of the case. Alwan Brothers Company, an Illinois Corporation, is owned solely by Joseph and William Alwan and their spouses, and it has no parent or subsidiary company.

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OPINION BELOW

The Opinion of the Supreme Court of Kentucky affirming the Opinion of the Kentucky Court of Appeals was rendered September 8, 1988, and it is unpublished. It is set out in the Appendix hereto.

JURISDICTION

The order of the Supreme Court of Kentucky denying Petitioners' petition for rehearing was entered October 27,1988; and upon such denial the opinon of that court rendered September 8,1988, became final.

Jurisdiction of this Court is invoked through 28 U.S.C. §1257(3).

CONSTITUTIONAL CLAUSE INVOLVED

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A man named Larry Janssen bilked several people in Illinois and Kentucky out of several thousand dollars through fraudulent investment schemes in the late 1970's.

Janssen was an expert cattle handler and trader. He used these skills, along with his winning personality, to gain the confidence of persons unskilled in the cattle trading business and to convince those people to invest monies in purchases of cattle for resale.

Almost always, the investors would make sizeable profits on their initial ventures. Then, after reinvestments grew, Janssen would pocket the money and disappear.

Among the victims of Janssen were Jane Gnidovec of Peoria, Illinois, David Towell of Bowling Green, Kentucky, and Robert Dawson, also of Bowling Green, Kentucky. Gnidovec invested and lost $6,000. Towell lost $26,562. And Dawson lost, "right at $20,000" in his last investment with Janssen.

Apparently several others, in Peoria, Bowling Green, and elsewhere, lost similar investments.

Also among the victims of Larry Janssen were Joseph and William Alwan. The Alwan brothers owned and operated a successful meat market in Peoria, Illinois, as well as other small businesses. A long-time employee of the Alwans was the father of Larry Janssen. Janssen's father, just before his death, extracted from the Alwans a promise to take care of his family. And, to meet that promise, the Alwans employed Larry Janssen, first as a truck driver, and then as manager of a cattle farm of theirs near Peoria.

While working in that capacity, Janssen began, "doing my own thing with . . . cattle." He became acquainted with

Jane Gnidovec, an employee of another meat market in Peoria. And, after impressing her with ribbons and trophies evidencing his expertise with cattle, Janssen defrauded Gnidovec of her $6,000.

The Alwans were unaware of this fraud. And when Gnidovec sued and obtained a judgment against Janssen in Illinois, no joinder or mention of the Alwans was made by her.

Later, the Alwans purchased a cattle farm near Bowling Green, Kentucky (where land was much less expensive than near Peoria); and they assigned Janssen to Bowling Green to manage the cattle on that farm.

Soon Janssen renewed his investment schemes with people he met in Kentucky. And he sometimes displayed cattle belonging to the Alwans with representations that those cows were the purchases made with the Kentuckians' funds. Janssen also began selling the Alwans' cattle and pocketing the proceeds.

Eventually, of course, Janssen was found out, arrested and convicted. Because he had spent all his gains, his estate was a barren source for recompense.

Some investors began to suspect and accuse other investors of complicity with Janssen. Some participants with Janssen (other than Respondents) sued other participants, including the Alwans. The suit went to trial in the Warren Circuit Court at Bowling Green, Kentucky. The Alwans were released by a directed verdict, and the jury found for the other defendants.

Thereafter Respondents filed their suit in the same court, upon the same claims of complicity, but only against the Petitioners Alwan.

Respondents claimed that the brothers Alwan

knowingly and maliciously aided and abetted the schemes of Janssen. And, clearly, Respondents convinced the jury that all of Janssen's fraudulent dealings were conducted either at the direction of or in concert with Petitioners Alwan. But no evidence of gain to the Alwans was ever presented.

The claims were tried together in a single proceeding upon the issues of both liabiality and damages, including Respondents' pleas for punitive damages.

In accord with the normal practice in Kentucky, there was no bifurcation of the trial, no separate consideration by the trial court or jury of the demands for punitive damages. And, with regard to the amount of allowable punitive damages, the trial court instructed the jury only that such awards, "must bear a reasonable relationship to the actual damages incurred by the plaintiffs in this action."

The Respondent Gnidovec, for her loss of $6,000, was awarded that sum plus $250,000 in punitive damages. The Respondent Towell was awarded $313,159, representing his lost investment of $26,562, plus $37,597, in pre-judgment interest, plus $250,000 in punitive damages. And the jury found for the Respondent Dawson in the amounts of $40,900 compensatory damages (lost investment plus interest) and $250,000 punitive damages. These verdicts, totalling $860,059 were rendered against the Petitioners Alwan.

Petitioners applied to the trial court for a new trial citing, **inter alia**, the illegality and excessiveness of the damages awarded. The trial court denied the request for a new trial.

Petitioners Alwan appealed to Kentucky's intermediate appellate court, the Court of Appeals. To that court Petitioners argued (among other things) that the punitive

damages were excessive fines contravening the restrictions of the Eighth Amendment to the United States Constitution and the method of assessing those damages lacked due process, in violation of the Fifth and Fourteenth Amendments.

The Court of Appeals addressed Petitioners' constitutional arguments and expressed its dismay at the lack of procedural safeguards and need for better assurance of due process in punitive-damage assessments.

The author of the majority opinion also submitted a separate concurring opinion in which he wrote,

> It is submitted that a serious problem exists in the punitive damage field that the Kentucky Supreme Court and/or Kentucky General Assembly should address . . . The main concern appears to be that punitive damages may be assessed in any amount without adequate procedural safeguards. Other areas of concern include a lack of due process or fundamental fairness in some instances.
>
> **Appendix, p. 11A.**

But that court concluded it was without adequate authority or guidance from the highest state court to remedy the injustice it perceived, so it affirmed the verdicts (Appendix, pp. 5A-12A).

Petitioners then sought and were granted discretionary review by the Kentucky Supreme Court.

In the state Supreme Court, as in the Court of Appeals, Petitioners did not argue that punitive damages were unconstitutional **per se**. Rather, Petitioners contended that the means of assessment of such damages was con-

stitutionally deficient because of the lack of guidelines and procedural safeguards. In the introduction to Petitioners' brief to that court they stated, "Appellants now ask for reversal of these awards, not because punitive damages should be un-awardable, but because they should be, but were not in this instance, reasonable and accountable."

The Kentucky Supreme Court failed to perceive the nature of Petitioners' complaint. That failure is evidenced in the opinion of that court noting that, "At oral argument movants' counsel stated that he would make no argument that punitive damages should be denied continued viablitity . . ." (Appendix, p. 3A). And in affirming the verdicts below the state Supreme Court declined without comment the requests of both its Court of Appeals and the Petitioners to establish means to meet the requirements of due process in the assessment of punitive damages.

ARGUMENT

The Requirements of Due Process Prescribed By The Fourteenth Amendment Are Not Met in Present Procedures For the Assessment of Punitive Damages; But This Failure May Be Judicially Cured.

Petitioners are aware that this Court has recently granted certiorari in the matter of **Browning Ferris Industries of Vermont Inc.** v. **Kelco Disposal Inc.** (Docket No. 88-556) involving argument upon the constitutionality of punitive-damage awards. And Petitioners submit that the instant case offers an opportunity for complimentary considerations.

The primary thrust of Petitioners' plea is that awards of punitive damages, in Kentucky and through most of the nation, are not accountable. That is, there is no standard or gauge by which the size of such awards may be predicted or measured.

It is the process of determining the **amount** of punitive damages which Petitioners assert is the most unfair aspect of proceedings involving claims for such damages.

In this instance, the punitive award to Respondent David Towell was 9.4 times his "actual cash loss" of $26,562. To Respondent Robert Dawson the jury awarded 12.5 times his lost investment of $20,000. And Respondent Jane Gnidovec was given a prize nearly 42 times her loss of $6,000. The three verdicts were rendered by one jury upon evidence of a single course of conduct on the part of Petitioners.

These vastly differing multiples of compensatory damages assigned by the jury as appropriate punishment are, perhaps, the most irrational symptoms of the amorphous, undefined character of punitive damages.

Universally, compensatory damages are limited by established, recognized standards. For example, a plaintiff may not receive the value of a thoroughbred stallion in return for the negligent destruction of a decrepit plow horse. Or the power to earn lost by an assembly-line worker is not calculated against the expected wages of a surgeon.

But with punitive damages there is simply no system of measurement. Only the visceral reactions of jurors and jurists are applied to the determinations of "correct" or "reasonable" sums for these civil punishments.

> In overturning jury awards, the courts consistently rely upon Delphic pronouncements about the obvious passion and prejudice of the jury; reasoning rarely accompanies the results. . . .
>
> . . . [And,] [a]lthough legislatures have set limits on criminal punishments and have rarely found that sound public policy warrants a maximum fine of six figures, they have abdicated all responsibility with respect to punitive damages, imposing no maximum and providing no guidance. Jurors are simply told to punish and deter . . . The jury must guess the parameters that should guide their decisions.
>
> Wheeler, **The Constitutional Case For Reforming Punitive Damages Procedures**, 69 Va. L. Rev. 269, 318-319 (1983).

In several jurisdictions courts have striven to define boundaries for punitive damage awards by limiting the causes and requiring clear and convincing proof of those causes. See, for example, **Tuttle** v. **Raymond**, 494 A 2d 1353 (Me. 1985); **Gavica** v. **Hanson**, 101 Idaho 58, 608 P 2d 861 (1980); **Travelers Indem. Co.** v. **Armstrong**, 442 N.E. 2d 349 (Ind. 1982); **Wangen** v. **Ford Motor Co.**, 97 Wis. 260, 294

N.W. 2d 437 (1980); and **Roginsky** v. **Richardson-Merrill Inc.**, 378 F 2d 832 (2d Cir. [NY] 1967).

The Kentucky judiciary, however, has made no effort to establish a workable gauge for judging the appropriateness of punitive awards. A jury's punitive verdict must simply bear, "reasonable relationship to the injury and the cause thereof." **Fowler** v. **Mantooth**, Ky., 683 SW 2d 250, 254 (1984). And neither an enhanced burden of proof nor the showing of deliberate intent to harm is required by the Kentucky courts. **Horton** v. **Union Light, Heat & Power Co.**, Ky., 690 SW 2d 382 (1985).

And neither the Kentucky court nor any court of another state has squarely addressed a need for a yardstick in measuring the adequacy or excessiveness of punitive damages awards. They all, as noted above, rely upon "Delphic pronouncements" and visceral reactions to determine, case by case, whether to acquiesce to unguided verdicts.

> In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused.
>
> **Gertz** v. **Robert Welch, Inc.**, 418 U.S. 323, at 350, 41 L Ed 2d 789, 94 S. Ct. 2997 (1974).

The governmental machinery of the Commonwealth of Kentucky is now set to transfer the greater portions of Petitioners' estates to the Respondents.

> It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake . . .

Fuentes v. **Shevin**, 407 U.S. 67 at 87, 32 L Ed 2d 556, 92 S. Ct. 1983 (1972).

As Petitioners prepared for the trial below, they had no means by which they could discern the extent of their peril. There was no way to knowingly estimate the amount of their exposure prior to the jury's announcement of its punitive verdicts[2].

While Petitioners, as all litigants, could learn the elements and amounts of compensatory damages claimed through the pre-trial discovery process (which in Kentucky mirrors the Federal Rules of Civil Procedure), regarding the claims for punitive damages, they could discover only that Respondents felt insulted and outraged and hoped that members of a jury would feel similarly. No pre-trial calculations of educated estimates of values of the outrage could be made, because there were (and are) no standards by which such values could be measured.

Consequently, Petitioners entered trial below without notice of a fundamental factor. They did not know what was at stake.

Although the vagueness in criminal statutes which are judged constitutionally infirm usually attaches to the description of the conduct prohibited, a recognized evil flowing from such vagueness is arbitrary enforcement:

> . . . [I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for

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[2] In Kentucky, no claim of a particular amount of unliquidated, general or punitive damages is required or allowed in the pleadings (Ky. R. Civ. Proc. 8.01[2]). But that procedural rule, itself, is not at the center of the constitutional deficiency claimed here.

> resolution on an ad hoc and subjective basis with the attendant dangers of arbitrary and discriminatory application.
>
> **Grayned** v. **City of Rockford**, 408 U.S. 104 at 108-9, 33 L Ed 2d 222, 92 S. Ct. 2294 (1972).

The same evil arising from the vagueness in the law of civil punitive damages was encountered by Petitioners; and the same constitutional standard of fairness should attach to eradicate that evil.

Meaningful notice and opportunity to be heard prior to deprivation of a personal or property right are fundamental parts of due process. **Fuentes** v. **Shevin**, **supra**; **Mennonite Board of Missions** v. **Adams**, 462 U.S. 791, 77 L Ed 2d 180, 103 S. Ct. 2706 (1983). And due process requires such notice and hearing as is appropriate to the nature of the interest implicated. **United States** v. **Raddatz**, 447 U.S. 667 at 677, 65 L Ed 2d 424, 100 S. Ct. 2406 (1980); **Mullone** v. **Central Hanover Bank & Trust Co.**, 339 U.S. 306 at 313, 94 L Ed 865, 70 S. Ct. 652 (1950).

The competing interests involved in resolving punitive damages claims are special and extraordinary for civil proceedings. Unlike the ordinary litigation sounding in tort or contract in which restitution is sought, a claim for punitive damages seeks retribution in the nature of an added "private fine". **Gertz** v. **Robert Welch, Inc.**, **supra**, 418 U.S. at 350.

Commentators upon punitive damages as "private fines" have sought to define their character further. One perceptive characterization has been made by Professor Seltzer in, **Punitive Damages in Mass Tort Litigation: Addressing The Problems of Fairness, Efficiency and Control**, 52 Fordham L. Rev. 37 at 43, N. 12 (1983):

> These awards are not really damages at all. Rather, they are **quasi-criminal sanctions**

> imposed to punish defendants and to deter repetition of the offensive conduct by the defendant and other potential wrongdoers (Emphaisis added).

It is being argued that punitive damages are substantially criminal, and, therefore, criminal procedural safeguards should apply. See, Wheeler, **The Constitutional Case for Reforming Punitive Damages Procedures, supra**, 69 Va. L. Rev. at 349.

While in criminal cases the ultimate penalty is death, in civil litigation (outside domestic relation perhaps) punitive damages can be the most extreme resolution, the severest form of civil judgment.

In criminal matters when the death penalty may be invoked, special and extraordinary evidence and findings are required. **Furman** v. **Georgia**, 408 U.S. 238, 33 L Ed 2d 346, 92 S. Ct. 2726 (1972); **Godfrey** v. **Georgia**, 446 U.S. 420, 64 L Ed 2d 398, 100 S. Ct. 1759 (1980).

So too, Petitioners submit, should special and extraordinary evidence and findings be prerequisite to extreme civil punishment.

Ironically, the fair notice required by due process appears easier to meet in the criminal arena than in the civil. The death penalty is the final, and clearly understood peril faced by the defendant. But the claim for punitive damages notifies the defendant only that his exposure may be enhanced beyond restitution to an undefined extent.

For consideration of the constitutional sufficiency (and possible "cure") of a judicial or administrative procedure, this Court has prescribed inquiry into three interests:

> [F]irst, the private interest that will be affec-

> ted by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.
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> **Mathews** v. **Eldridge**, 424 U.S. 319 at 335, 47 L Ed 2d 18, 96 S. Ct. 893 (1976).

In trials involving punitive damage awards, the private interest to be affected is the estate of the defendant. It should be remembered that assessment of punitive damages follows compensatory damages. Thus, the plaintiff has already been made whole before consideration of civil punishment begins.

Punitive damage awards necessarily evidence the arousal of anger or outrage in jurors. And, consequently, passion is a ubiquitous component of such verdicts. And sober restraint of that passion does not naturally obtain in a jury unguided by standards or means of accounting for punishment.

And, because the extent of the defendant's exposure to punishment cannot be discovered prior to the jury's announcement of that exposure, the risk of wrongful deprivation of the defendant's estate is inherent in the process.

Cure of this circumstance can come with specificity; and the cost would be minimal.

Certainly, notice of the extent of enhanced civil exposure can be established. Congress has done so on numerous occasions. In the establishment of public

policies condemning certain acts and encouraging private litigation, Congress has decreed enhancement of compensation through double and triple damages, such as in actions for antitrust violations (15 U.S.C.§15), and those under the Racketeering Influenced and Corrupt Organizations Act (18 U.S.C. §1962) or upon frivolous appeals (28 U.S.C. §1912 and FRAP 38).

These legislative pronouncements and others like them evidence determinations that double or treble damages are sufficient to serve the punitive and deterrent purposes intended.

Upon consideration of these legislative remedies in statements of public policy, the judiciary, too, may fashion procedures to safeguard the right to fair notice in punitive civil actions.

Of course, the courts may establish stricter requirements of proof, including the necessity for clear and convincing evidence demonstrating specified elements of extraordinary wrongdoing: ". . . [T]he degree of proof required in a particular type of proceeding 'is the kind of question which has traditionally been left to the judiciary to resolve.'" **Santosky** v. **Kramer**, 455 U.S. 745, at 755-6, 71 L Ed 2d 599, 102 S. Ct. 1388 (1982).

Further, the courts generally retain authority to maintain and establish judicial presumptions, most of which have evolved through consideration of public interest and efficiency[3].

And Petitioners suggest that the courts may establish and refine a presumption that punitive damages which exceed the amount of a compensatory award (i.e. double damages) were rendered by a jury unduly influenced by

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[3]Such as the presumption that a child born in wedlock was fathered by the husband, or the presumption that a contemporaneous entry made in a shopbook is correct.

passion or prejudice. However, such a presumption, while giving notice to the defendant of the most likely maximum exposure, does not inflexibly shackle judicial proceedings with pre-determined "caps", because the plaintiff (appellee) would retain an opportunity to overcome the presumption on close appellate review.

The judiciary is capable also of refining the notice of extent of peril through stricter delineation of the elements which might support punitive awards and requirement of specification of those elements and the amounts sought for each in pleadings. The specific findings upon the elements could be required of juries.

The obligation of developing these factors to meet due process notice requirements may properly be left to the state courts. **Furman** v. **Georgia**, **supra**. But further consideration of approaches and minimum levels of notice may be addressed upon grant of certiorari here.

Petitioners do not suggest that the task will be simple or easy. To date, no court has been able or willing to squarely address the question of accountablility of punitive damages through definition of rational calculations or guidelines with which parties and juries may be instructed.

Petitioners submit that now, in conjunction with this Court's review of the issues of **Browning Ferris Industries of Vermont Inc.** v. **Kelco Disposal Inc.**, 88-556, the Court should require the process of establishment of such accountability to begin.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF KENTUCKY

87-SC-763-DG

ALWAN BROTHERS COMPANY, an Illinois corporation; JOSEPH ALWAN; WILLIAM ALWAN; and JOSEPH ALWAN and WILLIAM ALWAN d/b/a ALWAN BROTHERS PARTNERSHIP — MOVANTS

ON REVIEW FROM THE COURT OF APPEALS
V. No. 85-CA-3212-MR
(Warren Circuit Court No. 81-CI-889)

JANE GNIDOVEC, DAVID TOWELL, and ROBERT DAWSON — RESPONDENTS

ORDER DENYING PETITION FOR REHEARING

Movant's petition for rehearing is denied.
ENTERED: October 27, 1988.

ROBERT F. STEPHENS
CHIEF JUSTICE

RENDERED: September 8, 1988
NOT TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

NO. 87-SC-763-DG

ALWAN BROTHERS COMPANY, an ILLINOIS CORPORATION; JOSEPH ALWAN; WILLIAM ALWAN; and JOSEPH ALWAN and WILLIAM ALWAN d/b/a ALWAN BROTHERS PARTNERSHIP — MOVANTS

ON REVIEW FROM THE COURT OF APPEALS
V. NO. 85-CA-3212-MR
(Warren Circuit Court No. 81-CI-889)

JANE GNIDOVEC, DAVID TOWELL, and ROBERT DAWSON — RESPONDENTS

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Movants appeal from a judgment which awarded each of the respondents compensatory and punitive damages. The Court of Appeals affirmed the judgment, and we granted discretionary review.

Movants claim that the damages awarded by the jury were clearly excessive, and the trial court was obliged to set them aside.

The movants' complaint concerning compensatory

damages is that they erroneously included pretrial interest. CR 76.12(4) (c) (iv) requires a statement at the beginning of each argument in a brief which refers to the record showing whether the issue was properly preserved for review and, if so, in what manner. Movants' argument concerning the excessiveness of compensatory damages contains no such showing*. Even if this issue was properly preserved for review in some manner not disclosed to us as required by the civil rules, it appears to have no merit because the interest alleged by movants to be pretrial interest appears, from the record, to have been interest expense which respondents incurred on loans they obtained to invest in a fraudulent cattle purchase scheme for which the jury placed responsiblility on movants. As such, the interest on the borrowed money was a part of the total loss incurred by respondents in their ill-fated venture.

As to the punitive damages argument, movants' brief, again in violation of CR 76.12(4) (c) (iv), fails to contain any statement at the beginning of the argument concerning the preservation of the alleged error for review. At oral argument movants' counsel stated that he would make no argument that punitive damages should be denied continued viability in this state, arguing only that the amount of the punitive damages awarded in this case were excessive.

The record is replete with evidence concerning a fraudulent scheme which was perpetrated against many investors in various states. The sufficiency of the evidence to show the movants' responsibility in the perpetration of the fraud is not attached. The conduct of the parties res-

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* **Counsel's Footnote**: Movants' (appellants') notation of preservation of error was incorrectly placed in appellants' statement of the case. This improper placement and designation is not a fatal mistake under Kentucky law. **Crossly** v. **Anheuser-Busch, Inc.**, Ky., 747 SW 2d 600 (1988).

ponsible for the fraud was outrageous, and in consideration of the character of the conduct involved, the motives of the parties, the extent of the harm intended, and the relationship of the parties, we cannot say the award of punitive damages was clearly excessive.

The judgment is affirmed.

All concur.

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OPINION RENDERED: July 14, 1987; 10:00 a.m.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

No. 85-CA-3212-MR

ALWAN BROTHERS COMPANY, an Illinois Corporation, JOSEPH ALWAN, WILLIAM ALWAN and JOSEPH ALWAN and WILLIAM ALWAN d/b/a ALWAN BROTHERS PARTNERSHIP — APPELLANTS

APPEAL FROM WARREN CIRCUIT COURT
v. HONORABLE GORDON L. JOHNSON, JUDGE
ACTION NO. 81-CI-889

JANE GNIDOVEC, DAVID TOWELL and ROBERT DAWSON — APPELLEES

AND NO. 86-CA-13-MR

JANE GNIDOVEC, DAVID TOWELL and ROBERT DAWSON — CROSS-APPELLANTS

CROSS-APPEAL FROM WARREN CIRCUIT COURT
v. HONORABLE GORDON L. JOHNSON, JUDGE
ACTION NO. 81-CI-889

ALWAN BROTHERS COMPANY an Illinois Corporation, JOSEPH ALWAN, WILLIAM ALWAN and JOSEPH ALWAN and WILLIAM ALWAN d/b/a ALWAN BROTHERS PARTNERSHIP — CROSS-APPELLEES

AFFIRMING

* * *

BEFORE: COOPER, HAYES and WEST, Judges.

HAYES, JUDGE: This is an appeal and cross-appeal from a judgment entered September 20, 1985, in Warren Circuit Court awarding the appellees, victims of a sophisticated cattle fraud scheme, $6,000, $40,900 and $63,159.00, respectively, and $250,000 each in punitive damages. Appellants' motion for new trial was overruled November 11, 1985. We affirm.

The facts, complex as they revealed to be over the lengthy trial, are well known to the parties and will not be repeated herein except as needed in disposition of the issues on appeal.

Appellants, whom we will hereinafter refer to as Alwan Brothers, initially maintain that a directed verdict on appellee Jane Gnidovec's fraud claim should have been awarded them at the close of the evidence. However, upon examination of the voluminous trial record, which comprised proceedings lasting ten (10) days, it is apparent that the issue of appellants' principal-agent involvement with Larry Janssen, who himself plead guilty to the fraud, was appropriately a question for the jury. There was overwhelming evidence of the Alwan Brothers' connections with Janssen, i.e., Janssen's residence on their farm, their extensive business relationship, common legal counsel, Janssen's introduction before a group of investors as being an agent of Willie Alwan, and also as a partner.

As stated by the Court in **Taylor v. Kennedy**, Ky. App., 700 S.W. 2d 415, 416 (1985):

> In ruling on either a motion for a directed verdict or a motion for judgment notwithstanding the verdict, a trial court is under a duty to consider the evidence in the strongest possible light in favor of the party opposing the motion. Furthermore, it is required to give the opposing party the advantage of every fair and reasonable inference which can be drawn from the evidence. And, it is precluded from entering either a directed verdict or judgment n.o.v. unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ.

We find no merit to the claim that Gnidovec was somehow barred by the statute of frauds. We likewise hold as meritless the claim that her cause of action was time barred by the five (5) year statute of limitations, KRS 413.120. KRS 413.130(3) provides that in an action for relief or damages for fraud referred to in KRS 413.120(12), the cause of action shall not be deemed to have accrued until the discovery of the fraud. The action must be commenced, however, within ten (10) years of the fraud. **Boone v. Gonzales**, Ky. App., 500 S.W. 2d 571 (1977); **Skaggs v. Vaughn**, Ky. App., 550 S.W. 2d 574 (1977). The fraud scheme remained undiscovered until after the agent, Janssen, fled town in 1980 and the truckload of evidence was found. Her complaint against appellants was filed in 1980. Even if, as appellants contend, Gnidovec had discovered the fraudulent enterprise as early as 1976, her claim was timely filed. Nevertheless, had there been a genuine issue of the date of her discovery of their illegal conduct, and appropriate jury instruction should have been requested. **Wilson v. Commonwealth**, Ky., 601 S.W. 2d 280 (1980).

Appellants' next assertion centers around the jury's award of compensatory and punitive damages, which are

argued to be impermissibly excessive. However, it is clear that as an appellate court reviewing the evidence to decide whether a verdict should be set aside as excessive, we will not invade the jury's province to weigh conflicting evidence, judge the credibility of witnesses and draw ultimate conclusions. **Beatrice Foods Co. v. Chatham**, Ky., 371 S.W. 2d 17 (1963). In considering whether to set aside the award, the trial court and appellate court perform different functions. When a trial court is presented with the motion it must decide whether the award appears "to have been given under the influence of passion or prejudice or in disregard of the evidence or instructions of the court." CR 59.01(d).

> The "first blush" rule is a mechanism to assist the **trial court** in performing its responsibility when called upon to decide whether the award is so excessive as to appear "to have been given under the influence of passion or prejudice." CR 59.01(d). In its entirety it is that "a verdict may be set aside as excessive only if 'it is (so) to such an extent as to cause the mind at first blush to conclude that it was returned under the influence of passion or prejudice on the part of the jury.' " **Wilson v. Redken Laboratories, Inc., supra**, 562 S.W. 2d at 636.

On the other hand, the appellate function is properly described in **Prater v. Arnett**, Ky. App. 648 S.W. 2d 82 (1983):

> "Upon reviewing the action of a trial judge in (granting or denying a new trial for excessiveness), the appellate court no longer steps into the shoes of the trial court to inspect the actions of the jury from his perspective. Now, the appellate court reviews only the actions of the trial judge . . . to determine if his actions constituted an

> error of law. There is no error of law unless the trial judge is said to have abused his discretion and thereby rendered his decision clearly erroneous. Further, the action of the trial judge is presumptively correct . . ." 648 S.W. 2d at 86.

Davis v. Graviss, Ky., 672 S.W. 2d 928, 932 (1984). Once the issue is presented to the trial court, a reviewing court may not substitute its judgment for that of the lower court, nor may it apply the "first blush" rule; we are instead charged with the responsibility to ascertain whether there is evidence to support the verdict and judgment, when viewed in a light most favorable to the prevailing party. His decision is prima facie correct. **Davis, supra**. We decline to hold that the trial court erred as a matter of law in upholding the award.

Punitive damages, on the other hand, are grounded on misconduct involving more than commission of an intentional tort. Punitive damages may be awarded where the wrongdoing has been intentional, deliberate, and has the character of outrage. Prosser, **Law of Torts**, § 2 (4th ed. 1971). There must exist an element of implied malice, meaning conscious wrongdoing. The award of punitive damages survives because it expresses society's condemnation of abhorrent conduct and acts as a deterrent where other legal remedies do not suffice. Mallon and Roberts, **Punitive Damages Toward a Principled Approach**, 31 Hastings L.J. 639 (1980). The **Restatement (Second) of Torts**, § 908 (1977) sets forth the elements to be considered in assessing punitive damages. They include the character of the act as well as the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause. The factors illustrating the character of the act include the degree of outrageousness, the extent of culpability, the wrongdoer's motives, the relationship between the parties and the existence of provocation. **Restatement (Second) of Torts**, § 908 comment e (1977); Punitive

damages are perfectly appropriate in action for deceit. **Saberton v. Greenwald**, 146 Ohio St. 414, 66 N.E. 2d 224 (1946). The function of the appellate court is limited to reviewing the determination of the trial court, and its decision is presumptively correct. This Court will reverse only when it can be said that the trial court "clearly erred," or abused its discretion, in refusing to set aside the award. **Fowler v. Mantooth**, Ky., 683 S.W. 2d 250 (1984).

> Historically Kentucky has awarded punitive damages against the principal coextensive with the award of punitive damages against the agent, applying the agency principle, **respondeat superior**, in the same way to liability for punitive damages as it is applied when awarded compensatory damages.

Horton v. Union, Light, Heat & Power Co., 690 S.W. 2d 382 (1985). Under the above principles, and in light of the fact that we are unable to find examples in this jurisdiction to warrant holding otherwise, we are constrained to uphold the jury's award.

Lastly, it appears that the appellees' cross-appeal is purely protective in nature, being brought solely in the event this Court were to reverse the judgment below. We therefore will not address the issues raised.

Accordingly, the judgment of the Warren Circuit Court is affirmed.

WEST, JUDGE, CONCURS

HAYES, JUDGE, CONCURS BY SEPARATE OPINION IN WHICH

JUDGE WEST JOINS.

COOPER, JUDGE, DISSENTS.

HAYES, JUDGE, CONCURRING: This opinion is to express the uncomfortable feeling I personally have in affirming the punitive damage award in this case, expecially in the Gnidovec claim where the total amount of actual loss was $6,000. Unable to find any recent precedent in Kentucky for the reversal of a punitive damage award as excessive, this court is constrained to affirm these awards.[1] It is submitted that a serious problem exists in the punitive damages field that the Kentucky Supreme Court and/or the Kentucky General Assembly should address. The increasing interest in this area is evidenced by the ever-increasing news articles, law review articles and treaties on the subject. The main concern appears to be that punitive damages may be assessed in any amount without adequate procedural safeguards. Other areas of concern include a lack of due process or fundamental fairness in some instancs. The theory of punitive damages, the infliction of a monetary penalty (a fine, if you will), on the basis of outrageous conduct by a defendant, is not the problem. The manner in which punitive damages are invoked without apparent limitations in amount is the problem. It is submitted that the assessment of punitive damages, being a form of punishment where retribution and deterrence are primary, compensation being secondary, requires due process of law no less in these civil matters than in criminal ones.

The majority of the United States Supreme Court has recognized that the standards governing punitive damage awards often are "ill-defined." **Dunn and Bradstreet, Inc. v. Greenmoss Builders, Inc.**, 472 U.S. 749, 105 S. Ct. 2939,

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[1]The present Court of Appeals of Kentucky came into existence by amendment of the Kentucky Constitution in 1975 and actually became operational as a court in August, 1976. A review of the records of the court since that time fails to reveal any case wherein this court has been affirmed by the Kentucky Supreme Court where this court has reversed an award of punitive damages as being excessive.

2956-57 n. 4, 86 L. Ed. 2d 593 (1985). (Brennen, J., dissenting, joined by Marshall, Blackmun and Stevens, JJ.). The United States Supreme Court also has heard argument on the issue of punitive damages as they relate to the United States Constitution's Eighth Amendment prohibition against "excessive fines," although it did not decide the issue. **Aetna Life Insurance Co. v. Lavoie** 106 S. Ct. 1580, 89 L. Ed 2d. 823 (1986).

In any case, there are obvious constitutional challenges to the punitive damages area that need to be addressed, more appropriately we suggest, by the Kentucky Supreme Court than by the Kentucky General Assembly. That court should, when the opportunity arises, set forth meaningful substantive standards and adequate procedural safeguards for the award of punitive damages in Kentucky. At the very least, defendants are entitled to know, even as they are in criminal cases, the standards by which they may gauge their conduct to avoid such awards.

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